2010

The State of Utah v. A.H. and B.H. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, In the Interest of A.W. a child under eighteen years of age,	:	
Appellee.	:	Case No. 20101010-CA
A.H. and B.H.,	:	
Appellants.	:	

BRIEF OF APPELLEE STATE OF UTAH

APPEAL FROM ORDERS ENTERED ON DECEMBER 1 & JUNE 30, 2010
IN THE SEVENTH DISTRICT JUVENILE COURT,
THE HONORABLE SCOTT N JOHANSEN PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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BRIEF OF APPELLEE STATE OF UTAH

JURISDICTION

The Appellants are appealing the juvenile court's December 1, 2010 order which awarded attorney's fees to the Guardian ad Litem and reaffirmed the juvenile court's order of June 30, 2010, upholding the Division's refusal to consent to the Appellants' adoption of A.W., and dismissing their adoption petition. The Appellants filed a notice of appeal on December 16, 2010. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(c) (West 2009).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the juvenile court correctly determined that Appellants' adoption petition was not ripe for review because they had not properly served or notified the

requisite parties pursuant to the adoption code.

Standard of Review: Whether or not the Appellants properly complied with requirements to send notice to statutorily mandated parties is a mixed question of law and fact. The lower court's statutory interpretation of the adoption code is reviewed for correctness. The "'[a]pplication of statutory law to the facts presents a mixed question of fact and law. We review the juvenile court's findings for clear error and its conclusions of law for correctness, affording the court some discretion in applying the law to the facts.'" *State ex rel. O.C.*, 2005 UT App 563, ¶17, 127 P.3d 1286 (citing *State ex rel. G.B.*, 2002 UT App 270, ¶ 11, 53 P.3d 963). In addition, the question of standing and intervention is reviewed "under a correctness standard." *In re Adoption of I.K.*, 2009 UT 70, ¶ 7, 220 P.3d 464 (citing *In re Adoption of K.C.J.*, 2008 UT App 152, ¶ 7, 184 P.3d 1239).

2. Whether the Appellants failed to preserve their due process arguments.

Standard of Review: Whether an appellant failed to preserve an argument below is a matter this Court decides in the first instance and, therefore, there is no standard of review.

3. Whether the juvenile court violated the Open Courts Doctrine by denying the Appellants access to A.W.'s adoption case.

Standard of Review: "Constitutional issues, including that of due process, are questions of law which we review for correctness." *State ex rel. O.C.*, 2005 UT App 563, ¶ 17, 127 P.3d 1286 (citing *State ex rel. K.M.*, 965 P.2d 576, 578 (Utah App. 1998).

STATUTES, RULES, CONSTITUTIONAL PROVISIONS

1. Utah Code Ann. § 78B-6-110 (West 2009).

2. Utah Code Ann. § 78B-6-120 (West 2009).

3. Rule 4, Utah R. Civ. P.

Addendum A.

SUMMARY OF ARGUMENTS

The Appellants in this case are former foster parents who sought to adopt a former foster child. The child, A.W., was removed from their care based upon their inappropriate conduct. The Appellants filed an adoption petition after A.W.'s removal in October 2009, but it was not ripe to proceed until June 2010, when Appellants had finally complied with the notice and service requirements of the adoption code. By then, A.W. had been adopted by a foster family who met all of the adoption requirements and had properly complied with the adoption code.

Appellants challenge the juvenile court's determination that they failed to comply with the notice and service requirements of the adoption code, and argue that, even if they did not comply, the Division of Child and Family Services waived its right to receive proper service and notification. The juvenile court correctly determined that Appellants failed to notify and serve the proper parties, and that their petition was not ripe for review until June 2010.

In addition, Appellants claim that their due process rights were violated, but have failed to specifically preserve those arguments below. Finally, they claim that the Open Courts Doctrine provides a basis for their participation in the other adoption matter. Appellants have misinterpreted the doctrine and, thus, had no right to participate in the other proceeding.

A.W. was adopted more than a year ago and the juvenile court's order should be affirmed.

STATEMENT OF THE CASE AND FACTS

The Division of Child and Family Services (DCFS) removed A.W. from Appellants' (Harpers') foster home in October 2009. One day later, the Harpers filed an adoption petition. After several failed attempts by the Harpers to serve and notify the proper parties of the adoption petition, in addition to the filing of several motions, DCFS moved to dismiss the adoption petition. The juvenile court ultimately determined that the Harpers' adoption petition should be dismissed based upon the following:

1. The Harpers' petition was not ripe for review because the Harpers had failed to comply with the adoption code's requirements for service upon and notice to the proper parties until June 2010.

2. The child, A.W., was adopted before June 2010 by foster parents whose adoption petition was in compliance with the law.

3. DCFS, the agency with custody of A.W., would not consent to the adoption based upon the Harpers' failure to comply with all of the requirements for adoption.

4. It is in A.W.'s best interest to remain in her current adoptive home. (Order on Motion to Dismiss, dated June 30, 2010); Addendum B.

The juvenile court also awarded attorney fees to the Guardian Ad Litem in its June Order, then issued a final order in December 2010 concluding that the Harpers' claim was without merit and in bad faith, and ordering that $12,000 in attorney fees be reimbursed to the Guardian Ad Litem. (Order Regarding Attorney Guardian Ad Litem's Attorneys Fees, dated December 1, 2010); Addendum C.

A.W.'s Removal From Appellant's Home, Sex Abuse and Physical Abuse Allegations.

A.W. was removed from the Harper home in October 2009 due to allegations of sexual abuse, "instability in the home, and other improprieties that had occurred in the Harper home." (Division's Response to the Harpers' Objection to [A.W.'s] Adoption and Motion to Vacate and Contest Adoption at 2, ¶ 3; Ex. 3). The allegations of sexual abuse arose in part because A.W. disclosed that she "slept with her father [Mr. Harper] and that she liked it when he tickled her." (R. June 14, 2011 at 16). In addition, when DCFS initially questioned Mr. Harper about the removal, he stated, "I wonder if she [A.W.] said I took funny pictures of her or if she said I bit her on the butt," claiming that he may have accidentally bitten A.W. while wrestling. (Ex. 3 at 7).

The Division found the sexual abuse allegations to be unsupported. The Administrative Law Judge determined this was "due to A.W.'s unwillingness to talk about her previous disclosure[s]...," such as sleeping in the same bed with Mr. Harper on a regular basis, and because Mr. Harper interfered with the investigation. (Ex. 3 at 3-4) .[1] Based upon significant safety concerns, the ALJ upheld both A.W.'s temporary and permanent removal from the home. (Ex. 3 at 4-5). At the time of A.W.'s removal, Mr. Harper was also being investigated for allegations of physical abuse against his biological daughter, J.H., which were upheld at the administrative level. (Ex. 2.).

Mr. Harper Interfered with A.W.'s Respite Placement.

A.W. was placed in respite care with the Scalises from October 7 to October 14, 2009. (Division's Response to the Harper's Objection to [A.W.'s] Adoption at 2, ¶ 3). While at the Scalises' home, Mr. Harper called A.W. between three to four times a day, [2] despite being told by DCFS that he was not to contact A.W. (R. June 15, 2010 at 16, 18-20).

The Scalises took A.W. to be interviewed at the Moab Children's Justice Center (CJC) on October 14, 2010. Detective Kelly Bradford testified that Mr. Harper sat in a van with his family in the parking lot of the CJC while A.W. was being interviewed. (R. June 14, 2010 at 184-187). Mr. Harper, however, had not made arrangements with the

[1] The Harpers subsequently filed a Petition for Reconsideration, which was denied. (Order Denying Request for Consideration, Mar. 8, 2010).
[2] (R. June 14, 2010, 177-178).

Division for permission to be present at the CJC, and he was asked to leave, in part because Mr. Harper's behavior was interpreted as an attempt to "manipulate the outcome of the interview." (R. June 14, 2010 at 77; Ex. 3 at 4). As a result of Mr. Harper's incessant attempts to contact A.W. via the Scalises, "A.W. was moved to a second respite home due to concerns about contact between A.W. and Mr. Harper while at Ms. Scalise's home." (Ex. 3 at 4).

After being with the Scalises for four days, A.W. was placed with a new family. (Order on Mot. to Dismiss at 1, June 30, 2010). This family filed an Adoption Petition on March 15, 2010 and adopted A.W. on April 28, 2010. (Order on Mot. to Dismiss at 2, June 30, 2010).

The Harpers' Original Adoption Petition and Subsequent Motions Were Procedurally Deficient.

The day after A.W.'s removal, the Harpers filed a Verified Petition for Adoption. This petition, however, was not dated or signed by counsel, did not comply with the requirements under the adoption code, and was not properly served on the requisite parties. ((Verified Pet. for Adoption, Oct. 8, 2009); (*See* Division's Response to the Harper's Objection to [A.W.'s] Adoption and Mot. to Vacate and Contest Adoption at 2, May 24, 2010).[3]

The Harpers next filed a motion to require A.W. submit to a bonding assessment

[3] The AAG filed this response under case number 1032526; this is the case number for A.W.'s now-adoptive parent's petition to adopt.

with the Harpers. (Motion to Require DCFS to Make A.W. Available to Dr. John D. Livingstone, Nov. 19, 2009). Assistant Attorney General Julie Lund responded to this motion under the Harper's adoption case number (1025019) on December 2, 2009. AAG Lund argued that the Harpers lacked standing to bring the motion because "they... [were] not parties to the action." (Mem. in Support of Opposition to Harper's Mot. to Require DCFS to Make A.W. Available to Dr. John D. Livingstone at 1, Dec. 2, 2009).[4] The juvenile court denied the Harpers' motion "because of the failure to comply with Rule 10, Utah Rules of Civil procedure, regarding format, for failure to allege grounds for emergency ex parte relief... and because the motion is moot." (Order Denying Pet's Mot. to Require DCFS to Make A.W. Available to Dr. John D. Livingstone, Dec. 7, 2009).

Changes in the Harpers' Status as Foster/Prospective Adoptive Parents.

The Harpers failed to renew their foster care license in December 2009. (Ex. 5). Soon thereafter, the Division notified the Harpers that the Division would deny the Harpers application to renew their foster care license. (*See* Division's Response to the Harpers' Objection to [A.W.'s] Adoption and Motion to Vacate and Contest Adoption at 3, ¶ 10). In response, the Harpers allowed their license to expire on January 31, 2010 "for the express purpose of avoiding a Notice of Agency Action." (Order on Mot. to Dismiss at 6, June 30, 2010).

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[4]It appears that the use of the adoption case number was a clerical error, given the fact that the substantive argument was directed toward the Harpers' lack of standing in the child welfare matter. The Harpers would clearly have standing in their own adoption case.

Continued Deficiencies in the Harpers' Pleadings and Service of the Verified Amended Adoption Petition.

The Harpers filed a Verified Amended Petition for Adoption under Probate No. 2036019 in juvenile court on January 19, 2010. (Harpers' Verified Amended Pet. for Adoption, Jan. 19, 2010). There is no such case number associated with A.W. In addition, the Harpers did not properly serve the Division, nor did the petition contain the requisite statutory language pursuant to the adoption code. (*See* Order on Mot. To Dismiss at 2-3, June 30, 2010). The Harpers also filed a Motion for Temporary Placement of the child in their home under the case number 2036019. (Mot. for Temporary Placement Order, Jan. 19, 2010). The Harpers' Amended Petition and Motion for Temporary Placement should have reflected the original case number 1025019 (which is written in blue ink in the file).

On February 1, 2010, the Division filed a motion in the ongoing child welfare matter, opposing the Harpers' Motion for Temporary Placement, because the case number identified on the Harpers' motion did not reflect an actual case regarding the child, and the Division had never been served with the requisite adoption Notice or a copy of the Harpers' adoption petition. (Mot. in Opp. to the Harper's Mot. or Temporary Placement); Appellant's Br. Appendix. The juvenile court denied the Harper's petition for a temporary placement order. (*See* Order on Mot. for Temporary Placement, Feb. 9, 2010). The Harpers filed a Motion to Vacate Order Denying Petition for Temporary Placement, which the court also denied.

The Harpers then filed another Motion for Order Requiring Study of Bonding by Child under the adoption case number 1025019. (Harper's Mot. for Order Requiring Study of Bonding by Child, Feb. 11, 2010). The caption, however, refers to the A.W. child welfare matter. The Division, in turn, responded to the motion under the child welfare matter (case no. 1002735) on February 22, 2010.[5] (Division's Opposition to Harpers' Mot. for Order Requiring Study of Bonding by Child).

As a result of the multitude of pleadings and the Harpers' failure to adequately serve the Division with their adoption petition, the juvenile court stayed the Harpers' adoption proceeding "until either the Division of Child and Family Services is properly served, pursuant to UCA 78B-6-110, or the issue is briefed whether responses filed by the Attorney General constitute waiver of service." (Order Staying Proceedings, Mar. 8, 2010).

The Harpers made another attempt to serve the Division with a Summons and Adoption Petition on March 22, 2010. This Summons, however, was procedurally deficient because it did not contain the required statutory notice language of Utah Code Ann. § 78B-6-110(5), and was filed under case number 2036019 (the wrong case number).

On April 5, 2010, the Harpers provided a Certification of Mailing to the court, stating that they mailed a Summons and Notice of Adoption Proceedings to AAGs Hamilton and Lund on April 3, 2010. This appears to refer to the Summons served on the

[5] In the court file, the child welfare case number is crossed out with 1025019 written in by hand.

Division on March 22, 2010, which (as noted above) did not contain the statutory language required by the adoption code, and was filed under the wrong case number.

The Harpers filed another Certification of Mailing under case number 2036019 on May 3, 2010. (Certification of Mailing, May 3, 2010). Again, this was filed under an incorrect case number, the certificate addresses the Attorneys General Hamilton and Lund (rather than the Division), and the attached Summons and Notice of Adoption Proceedings was addressed to the GAL Connie Mower, not the Division.

The Division then filed a Motion to Dismiss the Harpers' Petition for failure to achieve proper service of process as required by the adoption code, the Utah Rules of Civil Procedure and the prior Order of the Court. (Mot. to Dismiss, Apr. 21, 2010). This Motion to Dismiss was filed under case number 2036019 (the wrong case number). However, the AAG made a special appearance, thus did not waive service. (Mot. to Dismiss at 1, Apr. 21, 2010).

The juvenile court concluded that the Harpers did not properly serve DCFS with "[n]otice complying with UCA 78B-6-110" until June 4, 2010. (Order on Mot. to Dismiss at 3, June 30, 2010).

Mr. Harper has an "unhealthy obsession" with A.W. and exhibits "self serving" behavior.

The ALJ and juvenile court both found that Mr. Harper's interest in A.W. borders on an "unhealthy obsession." (Ex. 3 at 4; Order on Mot. to Dismiss at 4, 6, June 30,

2010). Mr. Harper's own witness, Dr. Livingstone, "found that while Mr. Harper had issues with anxiety, depression and anger management," he was not concerned about Mr. Harper's parenting ability. (Order on Motion to Dismiss at 9, June 30, 2010). However, Dr. Livingstone simultaneously recognized that Mr. Harper's incessant phone calls and visits to the Division "bordered upon paranoia." (Order on Motion to Dismiss at 7, June 30, 2010).

In addition, Mr. Harper does not respect or follow Division orders. For example, in March 2010, Paul Smith, DCFS Director for the Eastern Region, asked Mr. Harper to have no contact with two former foster children, B.C. & V.C. Mr. Harper refused to comply with the Division's requests. (*See* Ex. 4 (Letter from Bradley Harper to Paul Smith, March 5, 2010)). Also, Mr. Harper has a history of being violent with children present[6] and acting in a controlling manner.[7]

More importantly, the juvenile court found Mr. Harper's testimony to be "inconsistent," "self serving and not credible." (Order on Mot. to Dismiss at 4, 9, June 30, 2010).

A.W. Was Adopted Over One Year Ago.

A.W. has been in her adoptive home since mid-October 2009 and was adopted in April, 2010. In March 2010, A.W.'s therapist, Dr. Elder, concluded that A.W. had "adjusted to her new family" and he expressed that "moving the child again would actually

[6] (*See* Ex. 6; Ex. 7).

[7] (Ex. 12, 1 (Claudia Perkins, LSCW, Activity Record Feb. 4, 2010)).

traumatize her more." (Ex. 1). The Juvenile Court found that A.W. had "adjusted very well to her new fost/adopt home... never had any difficulty sleeping alone... [and] is very close to the members of her new family." (Order on Mot. to Dismiss at 8, June 30, 2010). As of the hearing on the State's Motion to Dismiss last June, A.W. never asked about the Harpers, had "no desire to speak to or visit the Harpers," and could not "remember the names of anyone in the Harper household except for Marcelino." (Order on Mot. to Dismiss at 8, June 30, 2010). The Court found that A.W. was "happy with her adoptive family," and "wants to stay there." (Order on Mot. to Dismiss at 9, June 30, 2010).

ARGUMENT[8]

I. THE HARPERS FAILED TO PROPERLY SERVE AND GIVE NOTICE TO THE REQUISITE PARTIES PURSUANT TO UTAH CODE ANN. 78B-6-110 UNTIL AFTER A.W.'S ADOPTION

Utah Code Ann. § 78B-6-110 *et seq*. sets forth specific notice requirements for adoption petitions. (West 2009). The Harpers filed their original adoption petition in October 2009, then filed a Verified Amended Petition for Adoption on January 19, 2010. The Harpers failed to comply with the applicable statutory requirements, and never perfected notice or service upon the requisite parties until after A.W. was adopted by another family. Furthermore, they have not properly challenged the juvenile court's factual findings underlying its legal conclusion.

[8] This Court ordered the parties to brief issues regarding whether the Harpers brought their adoption claim in bad faith, justifying the juvenile court's award of attorney fees to the Guardian Ad Litem. These issues are not relevant to DCFS's interests in this appeal, and thus DCFS respectfully takes no position on them.

The Harpers claim that despite any errors in notice or service, the Division waived these requirements by responding to some of the Harpers' motions. Contrary to the Harpers' assertions, the Division did *not* generally appear and thus "waive" service or notice requirements.

A. The Harpers' Adoption Petition Was Not Properly Filed and Served Until June 4, 2010 at the Earliest.

The Harpers challenge the juvenile court's finding that "the Harper Adoption Petition was not ripe to proceed.... until DCFS and the GAL had received proper notice." (Order on Mot. To Dismiss at 10, June 30, 2010); Appellant's Br. at 50-52. The Harpers likewise challenge the juvenile court's finding that the Harpers' adoption petition provided to DCFS did not comply with the adoption statute notice requirements until June 4, 2010. (Order on Mot. To Dismiss at 3, 10, June 30, 2010); Appellant's Br. at 51-52.

The adoption code mandates that certain individuals or entities must be served with notice of an adoption petition, including:

> (a) any person or agency whose consent or relinquishment is required under Section 78B-6-120 or 78B-6-121, unless that right has been terminated by:
>
> (I) waiver;
>
> (ii) relinquishment;
>
> (iii) consent; or
>
> (iv) judicial action;
>
> ....
>
> (c) any legally appointed custodian or guardian of the adoptee.

Utah Code Ann. § 78B-6-110(2) (West 2009). Under subsection 120, "... consent to adoption of a child... is required from... the person or agency to whom an adoptee has been relinquished and that is placing the child for adoption." Utah Code Ann. § 78B-6-120(1)(g) (West 2009). Thus, the Division is entitled to be served with proper notice of an adoption proceeding as the legally appointed guardian/custodian, and because the Division's consent to adoption is required for a child in its care. *Id.*

The notice required by Utah Code Ann. § 78B-6-110 must comply with the following:

> (a) may be served at any time after the petition for adoption is filed;
> (b) shall be served at least 30 days prior to the final dispositional hearing;
> *(c) shall specifically state that the person served must respond to the petition within 30 days of service if he intends to intervene in or contest the adoption;*
> *(d) shall state the consequences, described in Subsection (6)(b), for failure of a person to file a motion for relief within 30 days after the day on which the person is served with notice of an adoption proceeding;*
> (e) is not required to include, nor be accompanied by, a summons or a copy of the petition for adoption; and
> (f) shall state where the person may obtain a copy of the petition for adoption.

Utah Code Ann. § 78B-6-110(5) (West 2009) (emphasis added).

The Utah Court of Appeals determined in *In re Adoption of S.L.F* that adoption petitioners must "follow the literal mandate of the Adoption Statute," to ensure proper notice. 2001 UT App 183, ¶ 16 n.1, 27 P.3d 583 (finding that child wasn't placed for adoption until grandmother filed petition in proper jurisdiction when child was at least six months old, and thus father should have received notice).

However, the Harpers have not strictly complied with the Adoption Code. Further, they have failed to mount a proper challenge to the juvenile court's findings by marshalling the evidence. When an appellant challenges the sufficiency of the evidence supporting a court's findings of fact, the appellate court requires them to first "marshall [sic] the evidence in support of the findings and then demonstrate that despite this evidence, the [juvenile] court's findings are so lacking in support as to be against the clear weight of the evidence." *State ex rel. D.G.*, 938 P.2d 298, 301 (Utah App.1997) (alteration in original) (citations omitted). The Harpers have not marshalled all of the record evidence that supports the juvenile court's findings.

The Harpers first claim that they properly served notice on the statutorily required parties prior to A.W.'s adoption. To properly serve a party whose consent is required for an adoption, service must be made in accordance with the Rules of Civil Procedure. Utah Code Ann. § 78B-6-110(7)(a) (West 2009). *See also* Utah R. Juv. P. 18(b); *State ex rel. T.M.*, 2007 UT App 233 (upholding dismissal of paternal grandfather's guardianship petition for his failure to properly serve the petition, and dismissing his appeal of adoption for failure to timely file). Pursuant to the Utah Rules of Civil Procedure, service shall be made on a State agency "by delivering a copy of the summons and the complaint to any member of its governing board, or to its executive employee or secretary." Utah R. Civ. P. 4(d)(1)(K).

As such, the Harpers' attempts to serve the "Division" via the Assistant Attorneys General were improper in the adoption matter. It is the Office of the Attorney General's responsibility to "represent the division in all court and administrative proceedings related to abuse, neglect, and dependency..." Utah Code Ann. § 78A-6-113(2)(b)(ii) (West 2009). The Attorney General's Office, however, does not have a statutory duty to represent the Division in adoption matters, and, in fact, was not representing the Division with respect to the Harper's adoption case because the agency had not been properly served.

The Harpers filed their original adoption petition in October 2009, shortly after A.W.'s removal. This petition was not dated or signed by counsel, did not comply with the requirements under the Adoption Code, and was not properly served on the requisite parties. (Verified Petition for Adoption, Oct. 8, 2009).

The Harpers filed a Verified Amended Petition for Adoption on January 19, 2010, however, (again) it did not include the requisite statutory language pursuant to Utah Code Ann. § 78B-6-110(5) (West 2009). In addition, the Verified Amended Petition for Adoption was filed under Probate No. 2036019, which is not a case number associated with A.W.

Due to the errors in pleadings and case numbers involving the Harpers, the juvenile court stayed the Harper's adoption proceeding "until either the Division of Child and Family Services is properly served, pursuant to UCA 78B-6-110, or the issue is briefed

whether responses filed by the Attorney General constitute waiver of service." (Order Staying Proceedings, Mar. 8, 2010).

However, the Harpers' next attempt to serve the Division on March 22, 2010 was insufficient. The Summons did not contain the requisite statutory language pursuant to Utah Code Ann. § 78B-6-110(5),(6). (Certification of Mailing, Apr. 5, 2010; Summons, Mar. 30, 2010). The Summons was filed under the wrong case number, 2036019, failed to "specifically state that the person served must respond to the petition within 30 days of service if he intends to intervene in or contest the adoption," and did not "state the consequences, described in Subsection (6)(b), for failure of a person to file a motion for relief within 30 days after the day on which the person is served with notice of an adoption proceeding." Utah Code Ann § 78B-6-110(5)(c)(d) (West 2009).

The Harpers filed another Certification of Mailing under case number 2036019 on May 3, 2010. (Certification of Mailing, May 3, 2010). Again, this was filed under an incorrect case number, the certificate addresses the Attorneys General Hamilton and Lund (rather than the Division), and the attached Summons and Notice of Adoption Proceedings was addressed to the GAL Connie Mower, not the Division.

The juvenile court found that the Harpers did not serve the requisite notice of their adoption proceedings on the Division until June 4, 2010. (Order on Mot. To Dismiss at 3, 10, June 30, 2010). However, this service and notice were too late, as A.W. had already been adopted in April 2010 by a family whose petition was procedurally and substantively

compliant before that of the Harpers. Due to the Harpers' failure to follow the statutory notice requirements and properly serve the Division, they never became a party to A.W.'s adoption, thus their attempt to undermine A.W.'s current adoption should fail.

B. The Division did Not Waive Service or Notice by Responding to the Harpers' Motions in the Child Welfare Matter

On the other hand, the Harpers argue that in the absence of perfected notice and service to the Division, the Division nonetheless waived the notice and service requirements by responding to the Harpers' motions. For example, the Harpers argue that the Division waived service when it responded to the Harpers' motion to require DCFS to make A.W. available for a psychological evaluation and bonding assessment with Dr. Livingstone, filed in November 2009. On December 2, 2009, AAG Julie Lund responded to this motion under the adoption case number, however asserted that the Harpers did not have standing in the matter. The adoption case number was obviously used in error, because the Harpers would clearly have standing in their own adoption matter.

Further, the substance of AAG Lund's response to the Harpers' motion focused on the child welfare matter, arguing that the Harpers no longer had standing as foster parents since A.W. had been removed. As the Utah Supreme Court held in *Frito-Lay v. Utah Labor Commission,* "courts are to look at the substance of a motion, not merely its title, to determine its validity." 2009 UT 71, ¶ 27, 222 P.3d 55. Accordingly, despite AAG Lund's response to the Harpers' motion, she was substantively arguing about the Harpers lack of

standing in the child welfare matter, and did not generally appear in the Harpers' adoption matter.

The Harpers next point to an appearance made by AAG Hamilton in a response to the Harpers' Motion for Temporary Placement for A.W., filed January 19, 2010. The Harpers claim that the Division generally appeared and waived the service requirements of the adoption code. However, the Harpers' Motion for Temporary Placement was filed under a case number that did not exist regarding A.W. Given that erroneous case number, it was unclear whether the Harpers were seeking an order of temporary placement via the child welfare matter or some other matter. Because it was incumbent upon the Attorney General's Office to protect the Division's custodial status rather than risk a default judgment, and in light of the confusion surrounding the case(s) that had been filed, the Attorney General's Office filed an Opposition to the Harper's Motion for Temporary Placement in the child welfare matter, as it is the Division's duty to respond to matters in the welfare case, and the Division had not yet been properly made a party to the Harper's adoption matter.

The Harpers also assert that the Division generally appeared when it responded to the Harpers' Motion for Order Requiring Study of Bonding by Child. The Harpers' Motion was filed under the adoption case number 1025019 on February 11, 2010. However, the caption of this motion referred to the A.W. child welfare matter, and thus was unclear as to what matter the motion pertained to. The Division, in turn, responded to

the motion under the child welfare matter (case no. 1002735), on February 22, 2010, to ensure that it was fulfilling its duties in the welfare case (and because the Division had still not been properly served with the Harpers' adoption petition).

The Division then filed a Motion to Dismiss the Harpers' Petition for failure to achieve proper service of process as required by the adoption code, the Utah Rules of Civil Procedure and the prior Order of the Court. (Mot. to Dismiss, Apr. 21, 2010). This Motion to Dismiss was filed under case number 2036019, the wrong case number, likely because that erroneous case number was used by the Harpers in previous filings and the Attorney General's Office remained unclear as to which case it was. However, the Assistant Attorney General made a special appearance, thus did not waive service. (Mot. to Dismiss at 1, Apr. 21, 2010).

Therefore, despite the Harpers assertions to the contrary, even if the specific notice and service requirements under the Utah adoption code *could* be waived by appearance, the Division did *not* submit to the jurisdiction of the court by responding to some of the Harpers' motions. Both the Harpers and the Division made errors in pleadings, but the Division did not waive any of the notice or service requirements. Rather, the Division merely sought to protect its interests in the child welfare matter, and thus responded to the Harpers' motions in the child welfare matter or made special appearances in the adoption matter. In addition, even assuming the AAGs' responses to the various motions somehow waived the Division's right to personal service, the Harpers' summons and notices never

contained the required statutory language under 78B-6-110 until after A.W. had been adopted by another party.

II. THE HARPERS FAILED TO PRESERVE THEIR DUE PROCESS CLAIMS.

The Harpers claim their due process rights were violated regarding the hearing on the Division's Motion to Dismiss. The Harpers failed to properly preserve this issue below. The Harpers claim that they preserved the issue below "with numerous objections to the testimony going beyond the scope of the Motion to Dismiss." Appellant's Br. at 20. However, the appellants do not cite any specific objection to the scope of testimony or the breadth of the hearing to support their preservation claim. An appellant's brief must have "a citation to the record showing that the issue was preserved in the trial court." Utah R. App. P. 24(a)(5)(A); *Jacobsen v. Jacobsen*, 2011 UT App 161.

In addition, the Harpers did not object to the Order setting the evidentiary hearing on the State's Motion to Dismiss, which clearly gave notice that if the motion were well taken, "it would be dispositive of several pending pleadings." (Order setting evidentiary hearing on Motion to Dismiss the Harper adoption petition, June 20, 2010; State's Mot. to Dismiss, Apr. 21, 2010).

It was only after the Court entered its decision that the Harpers attempted to raise a due process claim. (Motion for New Trial, or to Modify or Amend the Order or For Reconsideration, July 20, 2010). In this motion the Harpers claimed that "due process

safeguards should have been afforded" to them, however they cite no authority and provide no legal analysis to show how they were denied due process. (Mot. for New Trial, or to Modify or Amend the Order or for Recons. at 2-3, July 20, 2010). In the accompanying memorandum, the Harpers again failed to properly cite any legal authority or provide analysis to support their argument, other than vaguely referring to alleged "Due Process" violations, such as claiming that the Harpers came to the hearing "blind as to what was allowed, what was to be proved, and what the court's intent was." (Mem. in Support of Motion for New Trial, or to Modify or Amend the Order or for Recons. at 1-4, July 20, 2010).

An issue is properly raised in the trial court if: (1) the issue is raised in a timely fashion; (2) the issue is specifically raised; and (3) the issue is supported by evidence or relevant legal authority. *Hatch v. Davis*, 2004 UT App 378, ¶56, 102 P.3d 774. The Harpers have failed to adequately meet each of these three criteria. Accordingly, this Court need not address the Harpers' due process claims. As the Utah Supreme Court noted in *Brigham City v. Stuart*, "... we [the Court] are resolute in our refusal to take up constitutional issues which have not been properly preserved, framed and briefed." 2005 UT 13, ¶ 14, 122 P.3d 506, *rev'd on other grounds by* 547 U.S. 398 (2006) (citing *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346). [9] As such, this court need not address the

[9] However, even though the Harpers failed to properly assert a due process claim, the juvenile court nonetheless cursorily addressed the issue in its final Order, stating that the "Harper [adoption] petition was not ripe when the competing petition was granted..." and "...the full evidentiary hearing on the DCFS motion to dismiss the Harper petition

Harpers' claim that they were denied due process by utilizing the hearing on the State's Motion to Dismiss to dispose of other matters related to A.W.

Even if the Harpers preserved this claim, they improperly rely on *State ex rel. J.N.* to support their assertion that anyone who files an adoption petition is entitled to a hearing on the merits of the petition. 2000 UT App 73, 997 P.2d 345; Appellant's Br. at 55. The Harpers interpret "filing" in the adoption context as merely filing with the appropriate court. However, to properly "file" an adoption petition and become a *party* to adoption proceedings, the petitioner must "follow the literal mandate of the Adoption Statute," to properly comply with its notice and service requirements. *See In re Adoption of S.L.F*, 2001 UT App 183 at ¶ 16 n.1; *State ex rel. T.M.*, 2007 UT App 233 (finding that grandfather failed to serve his petition prior to child's adoption, and thus the juvenile court "did not deny him due process or a protected right to a hearing on his unserved petition.").[10]

More importantly, the Utah Court of Appeals in *J.N.* remanded the case to the lower court in order to determine whether or not the appellants actually filed an adoption

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satisfied any due process rights the Harpers may have had." (Order Regarding Guardian ad Litem's Attorneys Fees, Dec. 1, 2010).

[10] *See also In re Adoption of Doe*, 2008 UT App 449, ¶ 4-6, 199 P.3d 368 (father failed to strictly comply with statutory requirements for establishing paternity); *In re Adoption of Baby Girl*, 2010 UT App 114, ¶ 23, 233 P.3d 517 (finding that an unmarried biological father did not fully and strictly comply with paternity statute and thus "failed to preserve his right to contest Baby Girl's adoption."). The requirement that fathers must strictly comply with the paternity statutes parallels the adoption code's mandates for strict compliance because both strive to achieve permanence for children.

petition. *Id.* at ¶¶ 16-20, 22. The appellate record in *J.N.* was unclear as to whether or not a couple seeking to adopt had actually filed their adoption petition. *Id.*

For the Harpers, however, the lack of clarity was specifically addressed by the juvenile court in its March 8, 2010 order requiring the Harpers to properly serve the Division. As such, the record demonstrates the deficiencies in the Harpers' attempts to file a statutorily compliant adoption petition, and to properly serve the requisite parties.

In addition, while the *J.N.* court stated that adoption petitioners have "a right to a full evidentiary hearing on their adoption petition," this assumes that the petitioner *properly* filed by complying with the adoption statute's notice and service requirements. *Id.* at ¶ 15. For example, the *J.N.* court contemplated that if a person became a true private petitioner for adoption, they would become "parties to the adoption proceedings." *Id.* at 19. *See also State ex rel. T.M.*, 2007 UT App 233; *In re Adoption of A.B.*, 1999 UT App 315, ¶¶ 14-15, 991 P.2d 70. Thus, to be considered a true private petitioner for adoption, the petition must comply with notice and service requirements in order to confer upon the petitioner the status as a "party" to the adoption proceeding, Accordingly, the Harpers' attempt to interpret *J.N.* as entitling them to a full hearing is misplaced. If the Harpers had properly filed according to the adoption statute's mandates, only then would they have been entitled to a hearing.[11]

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[11]More importantly, however, even if the Harpers had properly filed (and were parties to the adoption as petitioners to adopt), the court has discretion to consolidate adoption proceedings and first consider (and rule on) the petition that is more procedurally compliant. *In re Adoption of A.B.*, 1999 UT App 315, ¶ 14 (finding that

Therefore, due to the Harper's failure to perfect the notice requirements and properly serve the Division, the Harpers did not have any standing in A.W.'s other adoption matter, were not parties to the adoption, and were not entitled to a full hearing on their adoption petition until after A.W. had already been adopted.

The Harpers also claim that they were denied due process because the hearing on the State's Motion to Dismiss in effect disposed of several other pending issues. However, contrary to this claim, the juvenile court specifically noted in its Order on May 20, 2010 that "[i]f this motion were well taken, it would be dispositive of several pending pleadings." (Order setting hearing date on State's Mot. to Dismiss, May 20, 2010). As such, the Harpers were put on notice that the hearings held on June 14 and 15 would potentially dispose of other pending issues related to A.W.

To satisfy procedural due process, the parties must receive "timely notice, which adequately informs the parties of the specific issues they must prepare to meet." *State ex*

Grandmother filed a competing adoption petition, but "neither served notice as required by law nor obtained a hearing date...," and the other adoptive parents' petition was "...more compliant with Utah's adoption statute and was properly the first petition to be considered..." *Id.* at ¶ 15). *See also State ex rel. S.G.*, 2007 UT App 412.

In addition, "[t]he discretionary dismissal of a[n adoption] petition after an unfavorable report reflects the court's role in evaluating a range of evidence to determine the child's best interest." *State ex rel. H.J.*, 1999 UT App 238, ¶ 50, 986 P.2d 115. If the Division will not consent to a petitioner's adoption, "the court is the proper place for a petitioner to challenge the withholding of consent by the state agency." *Id.* at ¶ 55. This is exactly what occurred at the hearing on the State's Motion to Dismiss on June 14-15, 2010. The Harpers were given an opportunity to challenge DCFS refusal to consent to the Harpers' adoption, and were put on notice that other matters may be disposed of at that same hearing.

rel H.J., 1999 UT App 238, ¶ 46. In *State ex rel. H.J.*, the court found that a grandmother had insufficient notice that a "single evidentiary hearing… [may] be dispositive of other issues not specifically raised at the hearing." *Id.* at ¶ 47.

The grandmother's case in *State ex rel. H.J.* is distinguishable from that of the Harpers because the Harpers were put on notice about the nature of the hearing by the Court Order setting the hearing date on the State's Motion to Dismiss. As noted above, the Court Order specifically stated that if the Motion was successful, it would be "dispositive of several other pleadings," and the relief requested by the Motion to Dismiss would render the Harpers' other claims irrelevant and/or moot. Accordingly, the Harpers' claim that they were denied due process because they were unaware of what was expected at the hearing is without merit.

III. THE JUVENILE COURT DID NOT VIOLATE THE OPEN COURTS DOCTRINE BY DENYING THE HARPERS ACCESS TO A.W.'S OTHER ADOPTION PROCEEDING

The Harpers assert that the juvenile court violated the Open Courts Doctrine by refusing them standing and access to A.W.'s other adoption matter. *See* Utah Const. Art. I § 11. Such a claim, however, misinterprets Utah's Open Courts Doctrine. The Doctrine provides:

> All courts shall be open, and every person, *for an injury done to him in his person, property or reputation*, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred

> from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause *to which he is a party.*

Utah Const. Art I § 11 (emphasis added). As argued above, the Harpers were never a "party" to the adoption proceeding due to their failure to comply with the mandates of the Adoption Code - to provide statutorily compliant notice and service upon required parties. As such, the Harpers never properly "filed" their adoption petition, and had no rights to participate in A.W.'s adoption proceedings.

In addition, the Harpers appear to interpret the Open Courts Doctrine as one that allows any party to access case files and be present at any juvenile court hearing or proceeding. However, adoption records are private records until they are sealed.[12] Utah Code Judicial Admin. R. 4-202.02. Accordingly, only certain persons may access and inspect adoption petitions, such as "a party to the adoption proceeding," by a court order "permitting access to the documents by a person who has appealed the denial of that person's motion to intervene," or by court order for good cause shown. Utah Code Ann. § 78B-6-141(2)(a),(b),(c) (West 2009).

The Harpers never became a "party" to the adoption proceedings, due to their failure to comply with the notice and service requirements of the Adoption Code. The Harpers' attempts to seek a court order to allow them access to A.W.'s adoption were thus

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[12]*See also* Utah Code Ann. § 78B-6-141(1), "A petition for adoption, the written report described in Section 78B-6-135, and any other documents filed in connection with the petition are sealed." Utah Code Ann. § 78B-6-141(1) (West 2009).

unsuccessful. Therefore, the juvenile court correctly rules that the Harpers had no standing in the other adoption case.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the juvenile court's order in this matter.

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLISHED OPINION

The State requests neither oral argument nor the issuance of a published opinion in this appeal.

RESPECTFULLY SUBMITTED this 13th Day of July, 2011.

MARK SHURTLEFF
Attorney General

Carol L C Verdoia

CAROL L.C. VERDOIA
Assistant Attorney General

CERTIFICATE OF MAILING

I here by certify that, on the 3rd day of July, 2011, I caused to be mailed, postage prepaid, two and exact copies of BRIEF OF APPELLEE STATE OF UTAH to:

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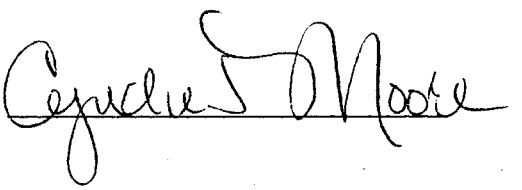

Addenda

Addendum A

Utah Code
Title 78B Judicial Code
Chapter 6 Particular Proceedings
Section 110 Notice of adoption proceedings.

78B-6-110. Notice of adoption proceedings.

(1) (a) An unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman:

(i) is considered to be on notice that a pregnancy and an adoption proceeding regarding the child may occur; and

(ii) has a duty to protect his own rights and interests.

(b) An unmarried biological father is entitled to actual notice of a birth or an adoption proceeding with regard to his child only as provided in this section.

(2) Notice of an adoption proceeding shall be served on each of the following persons:

(a) any person or agency whose consent or relinquishment is required under Section **78B-6-120** or **78B-6-121**, unless that right has been terminated by:

(i) waiver;

(ii) relinquishment;

(iii) consent; or

(iv) judicial action;

(b) any person who has initiated a paternity proceeding and filed notice of that action with the state registrar of vital statistics within the Department of Health, in accordance with Subsection (3);

(c) any legally appointed custodian or guardian of the adoptee;

(d) the petitioner's spouse, if any, only if the petitioner's spouse has not joined in the petition;

(e) the adoptee's spouse, if any;

(f) any person who, prior to the time the mother executes her consent for adoption or relinquishes the child for adoption, is recorded on the birth certificate as the child's father, with the knowledge and consent of the mother;

(g) a person who is:

(i) openly living in the same household with the child at the time the consent is executed or relinquishment made; and

(ii) holding himself out to be the child's father; and

(h) any person who is married to the child's mother at the time she executes her consent to the adoption or relinquishes the child for adoption.

(3) (a) In order to preserve any right to notice, an unmarried, biological father may, consistent with Subsection (3)(d):

(i) initiate proceedings in a district court of the state of Utah to establish paternity under Title 78B, Chapter 15, Utah Uniform Parentage Act; and

(ii) file a notice of commencement of the proceedings described in Subsection (3)(a)(i) with the state registrar of vital statistics within the Department of Health.

(b) If the unmarried, biological father does not know the county in which the birth mother resides, he may initiate his action in any county, subject to a change in trial pursuant to Section 78B-3-307.

(c) The Department of Health shall provide forms for the purpose of filing the notice described in Subsection (3)(a)(ii), and make those forms available in the office of the county health department in each county.

(d) The action and notice described in Subsection (3)(a):

(i) may be filed before or after the child's birth; and

(ii) shall be filed prior to the mother's:

(A) execution of consent to adoption of the child; or

(B) relinquishment of the child for adoption.

(4) Notice provided in accordance with this section need not disclose the name of the mother of the child who is the subject of an adoption proceeding.

(5) The notice required by this section:

(a) may be served at any time after the petition for adoption is

filed;

(b) shall be served at least 30 days prior to the final dispositional hearing;

(c) shall specifically state that the person served must respond to the petition within 30 days of service if he intends to intervene in or contest the adoption;

(d) shall state the consequences, described in Subsection (6)(b), for failure of a person to file a motion for relief within 30 days after the day on which the person is served with notice of an adoption proceeding;

(e) is not required to include, nor be accompanied by, a summons or a copy of the petition for adoption; and

(f) shall state where the person may obtain a copy of the petition for adoption.

(6) (a) A person who has been served with notice of an adoption proceeding and who wishes to contest the adoption shall file a motion to intervene in the adoption proceeding:

(i) within 30 days after the day on which the person was served with notice of the adoption proceeding;

(ii) setting forth specific relief sought; and

(iii) accompanied by a memorandum specifying the factual and legal grounds upon which the motion is based.

(b) A person who fails to fully and strictly comply with all of the requirements described in Subsection (6)(a) within 30 days after the day on which the person was served with notice of the adoption proceeding:

(i) waives any right to further notice in connection with the adoption;

(ii) forfeits all rights in relation to the adoptee; and

(iii) is barred from thereafter bringing or maintaining any action to assert any interest in the adoptee.

(7) Service of notice under this section shall be made as follows:

(a) (i) Subject to Subsection (5)(e), service on a person whose consent is necessary under Section **78B-6-120** or **78B-6-121** shall be in accordance with the provisions of the Utah Rules of Civil Procedure.

(ii) If service of a person described in Subsection (7)(a)(i) is by publication, the court shall designate the content of the notice

regarding the identity of the parties.

(iii) The notice described in this Subsection (7)(a) may not include the name of a person seeking to adopt the adoptee.

(b) (i) Except as provided in Subsection (7)(b)(ii) to any other person for whom notice is required under this section, service by certified mail, return receipt requested, is sufficient.

(ii) If the service described in Subsection (7)(b)(i) cannot be completed after two attempts, the court may issue an order providing for service by publication, posting, or by any other manner of service.

(c) Notice to a person who has initiated a paternity proceeding and filed notice of that action with the state registrar of vital statistics in the Department of Health in accordance with

the requirements of Subsection (3), shall be served by certified mail, return receipt requested, at the last address filed with the registrar.

(8) The notice required by this section may be waived in writing by the person entitled to receive notice.

(9) Proof of service of notice on all persons for whom notice is required by this section shall be filed with the court before the final dispositional hearing on the adoption.

(10) Notwithstanding any other provision of law, neither the notice of an adoption proceeding nor any process in that proceeding is required to contain the name of the person or persons seeking to adopt the adoptee.

(11) Except as to those persons whose consent to an adoption is required under Section **78B-6-120** or **78B-6-121**, the sole purpose of notice under this section is to enable the person served to:

(a) intervene in the adoption; and

(b) present evidence to the court relevant to the best interest of the child.

Amended by Chapter 237, 2010 General Session
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5,019 Bytes

<< Previous Section (78B-6-109) Next Section (78B-6-111) >>

78B-6-120. Necessary consent to adoption or relinquishment for adoption.

(1) Except as provided in Subsection (2), consent to adoption of a child, or relinquishment of a child for adoption, is required from:

(a) the adoptee, if the adoptee is more than 12 years of age, unless the adoptee does not have the mental capacity to consent;

(b) a man who:

(i) by operation of law under Section **78B-15-204**, is recognized as the father of the proposed adoptee, unless:

(A) the presumption is rebutted under Section **78B-15-607**; or

(B) the man was not married to the mother of the proposed adoptee until after the mother consented to adoption, or relinquishment for adoption, of the proposed adoptee; or

(ii) is the father of the adoptee by a previous legal adoption;

(c) the mother of the adoptee;

(d) a biological parent who has been adjudicated to be the child's biological father by a court of competent jurisdiction prior to the mother's execution of consent to adoption or her relinquishment of the child for adoption;

(e) consistent with Subsection (3), a biological parent who has executed and filed a voluntary declaration of paternity with the state registrar of vital statistics within the Department of Health in accordance with Title 78B, Chapter 15, Utah Uniform Parentage Act, prior to the mother's execution of consent to adoption or her relinquishment of the child for adoption;

(f) an unmarried biological father of an adoptee, only if he fully and strictly complies with the requirements of Sections **78B-6-121** and **78B-6-122**; and

(g) the person or agency to whom an adoptee has been relinquished and that is placing the child for adoption.

(2) (a) The consent of a person described in Subsections (1)(b) through (g) is not required if the adoptee is 18 years of age or older.

(b) The consent of a person described in Subsections (1)(b) through (f) is not required if the person's parental rights relating to the adoptee have been terminated.

(3) For purposes of Subsection (1)(e), a voluntary declaration of paternity is considered filed when it is entered into a database that:

(a) can be accessed by the Department of Health; and

(b) is designated by the state registrar of vital statistics as the official database for voluntary declarations of paternity.

Amended by Chapter 159, 2009 General Session
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<< Previous Section (78B-6-119) Next Section (78B-6-121) >>

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Rule 4. Process.

(a) Signing of summons. The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b)(i) Time of service. In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative.

(b)(ii) In any action brought against two or more defendants on which service has been timely obtained upon one of them,

(b)(ii)(A) the plaintiff may proceed against those served, and

(b)(ii)(B) the others may be served or appear at any time prior to trial.

(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.

(c)(3) If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Method of Service. Unless waived in writing, service of the summons and complaint shall be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process;

(d)(1)(B) Upon an infant (being a person under 14 years) by delivering a copy of the summons and the complaint to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(d)(1)(C) Upon an individual judicially declared to be of unsound mind or incapable of conducting the person's own affairs, by delivering a copy of the summons and the complaint to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and the complaint to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(d)(1)(E) Upon any corporation not herein otherwise provided for, upon a partnership or upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy of the summons and the complaint to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and the complaint to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and the complaint to the county clerk of such county;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and the complaint to the superintendent or business administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and the complaint to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy of the summons and the complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy of the summons and the complaint to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) Service in a foreign country. Service in a foreign country shall be made as follows:

(d)(3)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(3)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(3)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(3)(B)(ii) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the individual personally of a copy of the summons and the complaint or by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(d)(3)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(4) Other service.

(d)(4)(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order

allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

(d)(4)(B) If the motion is granted, the court shall order service of process by publication or by other means, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.

(d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.

(e) Proof of Service.

(e)(1) If service is not waived, the person effecting service shall file proof with the court. The proof of service must state the date, place, and manner of service. Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent authorized by appointment or by law to receive service of process. If service is made by a person other than by an attorney, the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, the proof of service shall be made by affidavit.

(e)(2) Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to paragraph (d)(3)(C), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(3) Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(f) Waiver of Service; Payment of Costs for Refusing to Waive.

(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 20 days from the date on which the request is sent to return the waiver, or 30 days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.

(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.

(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.

(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.

Advisory Committee Notes

Addendum B

IN THE SEVENTH DISTRICT JUVENILE COURT
CARBON COUNTY, STATE OF UTAH

STATE OF UTAH, in the interest of:	Order on Motion to Dismiss
Walker, Ashley	Case No. 1025019
Child(ren) Under 18 Years of Age	Judge Scott N. Johansen

This matter came on for hearing on June 14th and 15th, 2010 to consider a motion by the Division of Child and Family Services (DCFS) to dismiss the adoption petition filed by Brad & Stormy Harper.

Having considered the testimony, exhibits, and the pleadings, and having taken judicial notice of all prior findings and orders, the Court now finds as follows;

FINDINGS OF FACT

1. The Harper's filed this Adoption Petition on October 8, 2009.

2. Both natural parents voluntarily relinquished their parental rights and custody and guardianship has been with DCFS since July 10, 2008.

3. This child was placed by DCFS in the Harper foster home from January 16, 2009 to October 6, 2009.

4. After four days in respite care, beginning October 6, 2009, the child was placed in another fost/adopt home, and has remained there since that time.

5. Beginning November 7, 2009, Harper's commenced filing various pre-trial motions, some pro se, and some of which were prepared by counsel. Copies of the motions were mailed to DCFS, though there had been no service.

6. The Guardian Ad Litem appointed for this child in the DCFS case was not notified.

7. The Assistant Attorney General from Salt Lake City opposed some of the motions, without making a special appearance. The Assistant Attorney General from Price declined to respond, choosing instead to wait until DCFS was properly served.

8. The Court became increasingly concerned that important pre-trial issues may need to be decided without proper service on indispensable parties, and therefore stayed pre-trial orders and motions on March 8, 2010, with instructions to achieve proper service or brief whether service had been waived.

9. Also on March 8, 2010 the Court on its own motion appointed the same GAL to this case as had represented the child since the inception of the DCFS case.

10. On March 15 , 2010 another Adoption Petition was filed by the other foster parent.

11. On April 21, 2010 DCFS moved to Dismiss the Adoption Petition filed by the Harpers for failure to comply with the notice requirements of Utah Code Annotated 78B-6-110(5)

12. On April 28 , 2010 the second Adoption Petition was granted. Both DCFS and the GAL reported this adoption to be in the child's best interest, and consented to the same.

13. The Harper's had no notice of the adoption hearing on April 28 , 2010.

14. Notice complying with UCA 78B-6-110(5) was provided to the GAL on April 6, 2010 and to DCFS on June 4 , 2010, regarding the Harper petition to adopt.

15. On May 7 , 2010 Harpers filed an Objection to the Adoption by the other foster parent and a Motion to Vacate the same.

16. At no time after removal of this child from the Harper home would DCFS have consented to the Harper adoption as required by UCA 78B-6-120(1)(g).

17. Paul Smith, director of the Eastern Region, DCFS, identified eight reasons why consent for the Harpers to adopt would not be granted:

a. The removal of the child from the Harper home for violating rules regarding sleeping arrangements for foster children, which removal had been upheld by an Administrative Law Judge, and was on appeal.

b. Mr. Harper had a supported finding of child abuse of his daughter within the last year, which finding had been upheld by an Administrative Law Judge, and was on appeal, which findings disqualifies Mr. Harper as an adoptive parent.

c. Recommendations from Dr. Livingstone that Mr. Harper learn "additional appropriate behavior management skills" and that he and his family engage in family therapy (See exhibit 10).

d. Mr. Smith's review of police reports regarding two disorderly conduct charges where in Mr. Harper was convicted. (see exhibits 6 and 7).

e. Lack of boundary issues on the part of Mr. Harper regarding other foster children and foster parents, inappropriate and incessant contact with DCFS, and others,

and refusing to follow DCFS instructions.

f. The loss of the Harper's foster care license due to violating the rules regarding sleeping arrangements regarding this child.

g. That the Harper home was up for sale, in contemplation of a move to Colorado.

h An unhealthy obsession toward this foster child by Mr. Harper.

18. It was reasonable for DCFS to be concerned with violation of the rules regarding a female foster child sleeping with the foster father in a room separate from the foster mother, on a regular basis. Harpers' testimony conflicted regarding the child coming to Mr. Harper's room within 30 minutes of being put to bed, and Mrs. Harper's testimony that Mr. Harper was often in the master bedroom with her until 1:00 AM when he moved to the other room because he couldn't sleep. This is especially concerning considering Mr. Harper refused to allow the child to be interviewed outside his presence. Why DCFS did not insist on this interview defies all explanation. It is also notable that Mr. Harper told Jim Jennings, a DCFS worker, that the child slept on the couch, which is where Mr. Harper sleeps, and later changed his story to have her sleeping on the floor. It is also concerning that this child told her therapist that she slept with Mr. Harper and that her foster brother slept with Mrs. Harper in another room.

19. The sleeping problems Harpers alleged this child had are inconsistent with testimony that no such problems were observed in the respite home immediately after removal from the Harper home, nor at any time in the new adoptive home.

20. While the physical abuse substantiation is on appeal, it was nevertheless an appropriate factor for DCFS to consider at the time the other adoption became ripe for consideration. While this court expresses no opinion about whether the incident with the daughter, Jessica, amounts to abuse, the Court does observe that accounts of the incident by Jessica and Mr. Harper appear to vary from time to time and appear self serving. Viewed in a light most unfavorable to Mr. Harper, the incident does not appear especially egregious, based solely upon the evidence presented in this hearing. The Court acknowledges the issue here was the reasonableness of the DCFS conclusions at the time, rather than the factual accuracy of the information DCFS had or the legal sufficiency of the abuse finding. The Court is mystified why a parent would take a 17 year old foster boy into his home with a 14 year old daughter there, why sleeping arrangements put all of the children downstairs together with the parents upstairs, and is even more mystified why DCFS and the GAL allowed it.

21. DCFS was reasonable in concluding that the recommendations from Mr. Harper's own psychologist that he should learn more appropriate behavior management skills and engage in family therapy serve to portray this home as a less favorable placement then the other adoptive home where no such counseling was needed.

22. The two police reports regarding Mr. Harper's disorderly conduct convictions, which were reviewed by Paul Smith when deciding whether to withhold the consent of DCFS to the Harper adoption, taken alone, were insufficient to justify refusing that consent. However it was reasonable for DCFS to consider those reports in making that decision.

23. The lack of boundaries issues regarding this child, other foster children, other foster parents, and refusing to follow DCFS instructions were valid considerations for DCFS to take into account when deciding whether to consent to the Harper adoption. The Harpers' explanations for this conduct lacked credibility. Of particular concern was Mr. Harper's interference with custody and supervision of the Chavez girls vis a vis DCFS and their foster parents after they were removed from the Harper home.

24. Harpers elected to allow their foster care licence to expire in January 2010 for the express purpose of avoiding a Notice of Agency Action. The forfeiture of the foster care license standing alone justifies withholding of the DCFS consent to the adoption. Were the Harpers to be considered for adoption, this child would have to be placed back in the Harper home for another six month period prior to the adoption. Given all the controversy of this case, DCFS could not be expected to place her in the Harper home with custody and guardianship to the Harpers , especially given that the licence controversy originated from breaking the rules about sleeping with this foster child. Therefore she would have to remain in DCFS custody during those six months. However DCFS would be prohibited from placing her with the Harpers because they did not have a foster care license.

25. It was not unreasonable for DCFS to consider whether the Harpers were in precarious financial condition in determining whether to consent to this adoption. Having the house for sale, divesting of businesses, twenty eight tax liens and numerous law suits against the Harpers are legitimate worries , though apparently these things reflect standards of conduct rather than financial instability.

26. The appearance of an unhealthy obsession with this child by Mr. Harper as

evidenced by the sleeping arrangement, incessant calls and visits to the DCFS office in Price, showing up uninvited the Children's Justice Center when this child was being interviewed, and the Scalise episode combined to raise legitimate concerns. The number and frequency of contacts to the DCFS office is bizarre, as is the " unusually high" number of calls/visits to Dr. Livingstone's office which Dr. Livingstone said bordered upon paranoia. The Harpers' explanation of their appearance at the CJC is irrational, and while it is uncertain exactly what was said to the Scalises about staying over night at their place, it is clear from the observation of Mr. Scalise on the witness stand that he was not telling the whole truth. The Court does not attach much weight Ms. Fausetts' recounting of Mrs. Scalies' version of the facts just because of the unreliability of the double hearsay . Regardless of the actual truth of this matter, it was reasonable for DCFS to consider the information available to DCFS at the time in deciding whether to consent to the adoption. However, the Court does not put much weight to this factor.

27. It is reasonable, and therefore not arbitrary and capricious, for DCFS to reject the recommendations of the adoption committee on December 16, 2009 (see exhibit 13) given that this child had already been removed to a new fost adopt home, which did not require on going services of the type recommended by the committee for the Harper home, the Harpers' foster care licence was due to expire in two weeks, with no application for renewal, the pending ALJ hearings, and concerns of the GAL regarding the suitability of the Harper home. The minutes of this meeting state very clearly that the function of the committee was only to make recommendations that were not binding.

28. The stated concern voiced by DCFS about the Harper children working at the

family business was given no weight by the Court. Children should be taught to contribute and to learn independent learning skills.

29. The placement of another child in Harper's custody and guardianship by the Ute Tribal Court during the same time period is inconsistent with actions taken by DCFS in this case, though somewhat distinguishable because the Indian child involved was male, and already had two brothers in the Harper home. Failure of the caseworker Wesley Smith to bring DCFS concerns to the attention of the Tribal Court is deplorable.

30. The instructions from Paul Smith to Greg Daniels to alter his adoption report, to be contrasted with ordering him to consider new information and prepare an objective addendum, is extremely disturbing, and calls into question any adoption study prepared by this DCFS office.

31. At the time DCFS had to make a decision about which adoption petition merited its consent, the Harpers could not pass a SAFE check. This disqualifies them for adoption, This fact, standing alone, is sufficient reason to withhold consent to the Harper adoption.

32. This child has adjusted very well to her new fost/adopt home. She never had any difficulty sleeping alone anywhere except in the Harper home. She is very close to the members of her new family. The new fost/adopt home is a good, stable, safe environment.

33. This child expresses no remorse in leaving the Harper home, never inquires after the Harpers, has no desire to speak to or visit the Harpers, and cannot remember the names of anyone in the Harper household except for Marcelino.

34. Dr. Elder did not have sufficient information to compare the competing adoptive homes, and was engaged only as the child's therapist, rather than as a custody evaluator.

Nevertheless his opinion is of great worth to the Court on the subject of what is in this child's best interest. It is noteworthy that while this child is emotionally restricted and very closed, no sexual abuse has ever been disclosed.

35. The child is happy with her adoptive family. She wants to stay there. Her adoptive mother is her secure base. They have a loving relationship. In contrast, she called the Harper's " Brad and Stormy" while in respite care immediately after removal from the Harper home, indicating a lack of attachment to the Harpers.

36. Another removal at this time, for example back to the Harper home, would be harmful to this child. The instability and trauma which would inevitably result is not worth anything to be gained by removing her from her present secure placement.

37. Dr Livingstone, the only therapist engaged for the specific purpose of a parental fitness evaluation, found that while Mr. Harper had issues with anxiety, depression, and anger management, nevertheless these things gave Dr. Livingstone no concern regarding parenting ability, and that Mr. Harper was a low risk to self and others.

38. Mr. Harper's testimony was self serving and not creditable.

39. At no time during the pendency of this petition did the Harpers ever have any reasonable likelihood that DCFS would consent or be compelled to consent to their adoption. Therefore, it is reasonable to hold Harpers responsible for costs to the GAL in representing the child in this matter.

CONCLUSIONS OF LAW

1. The Court had continuing jurisdiction over this child pursuant to UCA 78A-6-103(1)(c) in that the Court had previously adjudicated this child as either being abused or neglected.

2. Notices of the Harper adoption petition provided to the GAL did not comply with 78B-6-110 until April 6, 2010.

3. Notices of the Harper adoption petition provided to DCFS did not comply with UCA 78B-6-110 until June 4, 2010.

4. Notice required by UCA 78B-6-110 can be provided at any time prior to 30 days before an adoption hearing, but must be given. Service pursuant to Rule 4 Utah Rules of Civil Procedure is required in an adoption proceeding (see UCA 78-B-6-110 (7)). It is improper to proceed with pre-hearing motions until indispensable parties (that is those parties identified in UCA 78B-6-110(2)) have been notified. To do otherwise may result in change in physical custody without notice to the legal custodian, or the ordering of such things as bonding studies or other examinations of the child without notice to or input from the GAL. Therefore the Harper Adoption Petition was not ripe to proceed to rule on interim motions until DCFS and the GAL had received proper notice. While appearance by motion normally waives lack of juridsiction objections, relative to compliance with the service requirements of Rule 4 URCP, it does not waive the right to the specific notice requirement in UCA 78B-6-110(5). Therefore the earliest date the pre-hearing motions could have been considered was after the custodian of the child received notice which complied with UCA 78B-6-110, which was June 4, 2010.

5. At the adoption hearing on the second adoption petition on April 28, 2010, the

Court found that all notice requirements had been met, all pre and post placement evaluations had been conducted, with a favorable recommendations, that the adoption was in the child's best interest, and all requirements of the Utah Adoption Act (UCA 78B-6-101et seq) had been met.

6. The Court declined to consolidate the two adoption petitions because : 1 That would have amounted to a waiver of the right of the GAL and DCFS to notice of the Harper petition per UCA 78B-6-110, 2. The Harper petition was not ripe for hearing because of the absences of favorable adoption evaluations and the lack of consent from DCFS, the legal custodian, 3. Mr. Harper's bizarre behavior as described in various pleadings made the Court uneasy about the safety of the child and the adoptive parent, were the Harpers to be made aware of their whereabouts. 4. Mr. Harper had an abuse substantiation, albeit on appeal.

7. Contrary to the Harpers' claim, there is no preference regarding competing adoption petitions based upon the alleged preference of a natural mother who has previously voluntarily relinquished her parental rights.

8. Contrary to the Harpers claim, they had no right to preferential consideration to adoption based on their status as formal foster parents. In fact, the adoptive parent was the current foster parent.

9. Contrary to the Harpers' claim, there is no right to preferential consideration to adopt because their petition was filed first. Their petition was not ripe for consideration on April 28 2010, and could not have been granted on that day.

10. It is not in this child's best interest to be adopted by the Harpers.

11. It is in the child's best interest to remain in the her adoptive home. The child's best interest, standing alone, is sufficient reason to withhold consent to the adoption.

12. DCFS is entitled to notice of the Harper adoption petition per UCA 78B-6-110(2)(a)and (c), and Rule 4 URCP.

13. The Harpers are not a qualified married couple under UCA 78B-6-117(4)(a) because their home would be an inappropriate placement for this child.

14. Consent from DCFS is required in order for this child to be adopted, per UCA 78B-6-120(1)(g).

15. Harpers cannot pass the requirements outlined in UCA 78B-6-128 regarding pre-adoptive placements.

16. Harpers cannot pass the requirements of UCA 78B-6-129 regarding post adoptive evaluations, and the Court declines to waive the same.

17. Harpers cannot meet the requirements of UCA 78B-6-131.

18. It would be detrimental to this child to change custody from the adoptive parent at this time.

19. Because the Harpers' adoption petition could not possibly pass the requirements of the Utah Adoption Act, it was proper for the Court to proceed with the other adoption petition first, and once it had been granted, there was no need to consider the second petition.

20. The withholding of consent by DCFS to adoption by the Harpers is not unreasonable.

21. Harpers' adoption petition is deficient in that consent from DCFS has not and

will not occur.

22. The Harpers' adoption petition is deficient because Mr. Harper cannot pass a back ground check.

23. Harpers failed to demonstrate that they were a qualified adoptive placement.

24. The competing adoption petition was the most compliant with the Utah Adoption Act.

25. Adoption by the adoptive family is dispositive of the adoption proceedings.

26. Harpers are not in the class of persons entitled to receive notice of the other adoption proceeding.

27. Harpers could not have overcome any of the proffered evidence at the other adoption hearing.

28. Case No. 1033659 , entitled DCFS vs Brad & Stormy Harper, is now moot.

ORDER

1. The Harper adoption petition is dismissed.

2. All outstanding motions part of this case are denied.

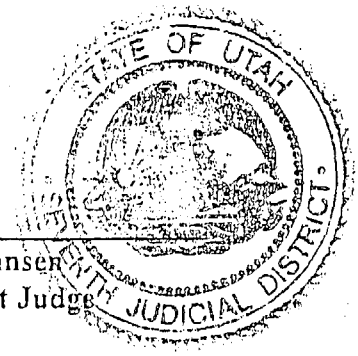
3. Case No. 1033659 is dismissed.

4. Attorney's fees are ordered reimbursed to the Guardian Ad Litem, pursuant to UCA 78A-6-902(6)(c) in an amount stipulated by the parties, or to be determined after further hearing.

5. The Petitioners have fifteen days to appeal.

Dated this 30th Day of June, 2010

Scott N. Johansen
Juvenile Court Judge



CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing document, postage prepaid to the following:

Ronald Barker
Angela Hamilton - email
Connie Mower - email

DATED this 30 day of June, 2010.

Kyleigh Thompson
Deputy Clerk

Addendum C

DEC - 1 2010

IN THE SEVENTH JUVENILE COURT
CARBON COUNTY, STATE OF UTAH

In the matter of the adoption of, **Ashley Walker DOB: 01-06-05** **A Child Under 18 years of Age**	**Order Regarding Guardian ad Litem's Attorneys Fees** **Case No. 1025019** **Judge Scott N Johansen**

On June 30, 2010 the Court awarded attorneys fees to the Guardian ad Litem in this matter. Various post judgment motions and an appeal were filed, all of which have been disposed of, and the Court ordered the Guardian ad Litem to finalize the matter of attorneys fees in an order dated September 29, 2010. On October 14, 2010 the Guardian ad Litem filed a motion and affidavit regarding the attorneys fees. No objection or response was filed in the time period allowed by rule, and the Court grant attorneys fees by order dated October 27, 2010. Subsequent to the filing of the order, Harpers filed an objection, on November 1, 2010. On November 19, 2010 the GAL requested the Court reconsider it's ruling because the GAL had granted Harpers an extension of time in which to respond to the GAL's motion for attorneys fees. While the GAL does not have authority to extend such due dates, and an extension of time was not requested of or granted by the Court, and neither party advised the Court of a stipulation to extend time, nevertheless equity demands that the Harpers' objection to the attorneys fees be considered. Having considered said objection and the GAL's response thereto the Court finds as

follows:

The GAL has requested an award of attorneys fees pursuant to Utah Code Annotated 78A-6-902 (6), 78B-5-825, Utah Rules of Civil Procedure Rule 11. Harpers correctly point out that section 902 allows assessment of the costs of the GAL against the "child's parents, parent, or legal guardian". Because Harpers do not fit into any of those categories, attorneys fees pursuant to UCA 78A-6-902 (6) is inappropriate. Also, because the procedures outlined in URCP Rule 11 have not been followed, Rule 11 sanctions will not be considered. Therefore, whether or not an award of attorneys fees is appropriate depends on compliance with UCA 78B-5-825. In order for an award of attorneys fees to be appropriate three elements must exist. First the party requesting attorneys fees must be the prevailing party, which condition has been met in this case. Second the position asserted by the Harpers must be without merit. Third Harpers' position must be in bad faith.

The Court reaffirms it's previous findings that Harpers' position was without merit and in bad faith. This is so because the child was removed from the Harper home in October 2009, the Harpers allowed their foster care license to expire in December 2009, the Harpers have violated DCFS rules regarding sleeping arrangements for foster children, Mr. Harper had a physical abuse substantiation finding which had been upheld by an Administrative Law Judge and was pending on appeal, Harpers had interfered with other foster children, and other foster parents, the foster child who is the subject of this action could not have been adopted by the Harpers without a new six month residency in the Harper home, the Harpers knew or should have known that the recommendation of the adoption committee in December 2009 was not binding but rather a recommendation only, and the Harpers knew that the competing adoption had already been granted in April 2010, long before the hearing on the motion by the Division of Child and Family

Services to dismiss the Harper adoption petition. Based on these facts, the likelihood of a Court ignoring the factors in favor of the competing adoption, setting the competing adoption aside, removing the child from the competing adoptive home, placing that child with the Harpers for six months even though they had no foster care license, and with all of the legitimate reasons for removal from the Harper home in October 2009, and with no legitimate best interest arguments in favor of such actions, said likelihood is so remote as to make the Harpers' petition in bad faith, and without merit. While much of these circumstances did not exist at the time that the adoption petition was filed, nevertheless the petition was "brought or asserted" in bad faith due to the development of these facts subsequent to the filing of the petition.

The Harper objection that a hearing was never granted under UCA 78B-6-135 is without merit because the Harper petition was not ripe when the competing petition was granted, the granting of which made it un-nessacery for the Court to consider the Harper petition, and further the full evidentiary hearing on the DCFS motion to dismiss the Harper petition satisfied any due process rights the Harpers may have had.

The Court finds the hourly rate asserted by the GAL to be reasonable and further finds the number of hours expended by the GAL to likewise be reasonable. While the GAL was not made a party until March 8th 2010, nevertheless she was on notice of the Harper petition and subsequent motions and the expenditure of time prior to her being duly served was justified. The GAL affidavit is reasonably detailed in description of time spent and work performed to satisfy the requirements of URCP Rule 73.

Oral argument of this Motion, requested by the Harpers, would add nothing, and would only subject the Harpers to a claim of further attorneys fees from the GAL. Judgment in the amount of $12,000.00 is therefore granted against Bradley and Stormy Harper. The Court finds

the Harpers to not be impecunious.

Payment shall be made to the Office of the Guardian ad Litem attn: GAL accounts receivable PO Box 140241 in Salt Lake City 84114-0241 no later than 30 days from the date of this order.

Dated this 15 day of December 2010.

Judge Scott N Johansen

STATE OF UTAH SEVENTH JUDICIAL DISTRICT

Case: 1025019

ASHLEY RENEE WALKER
1 Tobe Day Rd
La Sal UT 84532

Documents were mailed or served to the following:

ANGELA N HAMILTON
CHILD PROTECTION DIVISION
475 W PRICE RIVER DR STE 150
PRICE UT 84501

Email: 12/01/2010
By: _____

Connie L Mower
1850 N 560 W
CASTLEDALE UT 84513

Email: 12/01/2010
By: _____

RONALD C BARKER
2870 S STATE ST
SALT LAKE CITY UT 84115-3692

Mailed w/o rights: 12/01/2010
By: _____